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AN INQUIRY INTO ITS ORIGIN, AND AN ACCOUNT OF
THE PRESENT STATE OF THE LAW IN CANADA

A Lecture

BEING ONE OF THE "OCCASIONAL LECTURES" DELIVERED BEFORE THE
LAW SCHOOL OF BISHOP'S COLLEGE
AT SHERBROOKE, P.Q.

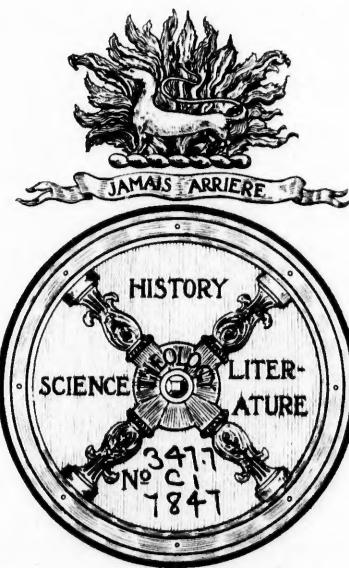
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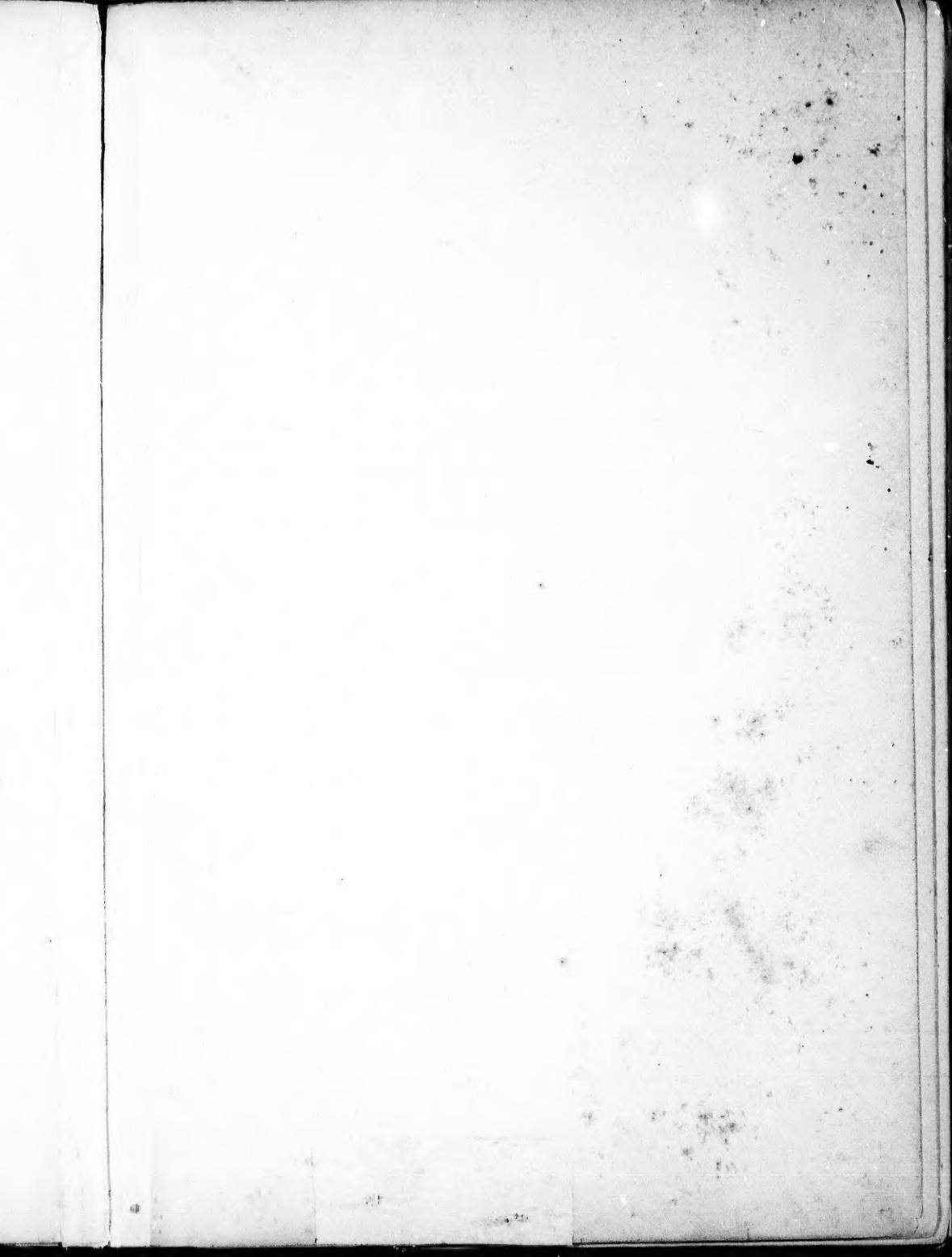
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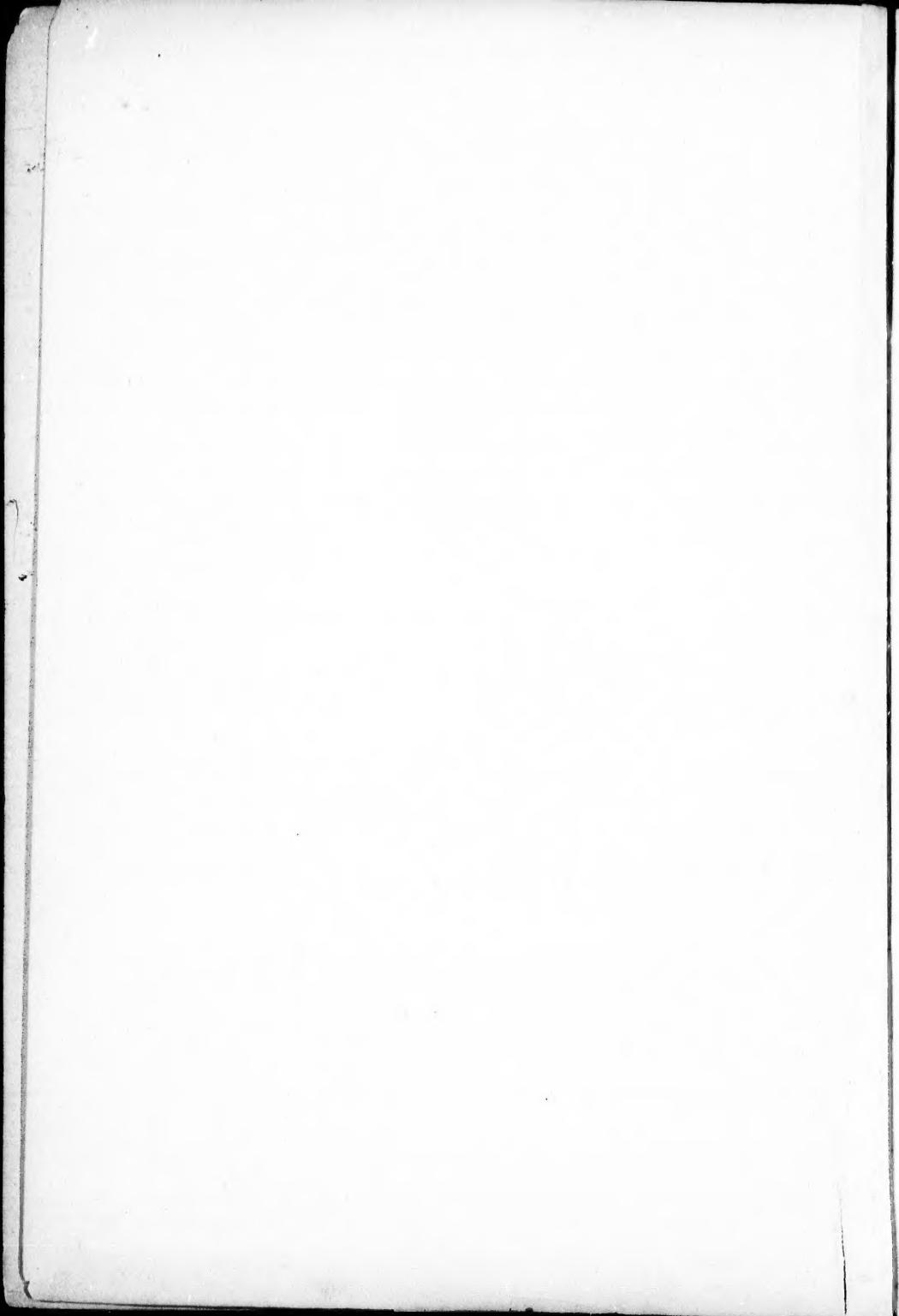
MONTREAL
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MR. CHAIRMAN AND GENTLEMEN,

I shall not apologise for the dryness of my subject to-day, nor for the dry manner in which it must be treated ; because those whom I am now addressing, being students of law, know well that the goddess Themis is not one of the Muses, and that those who follow her find more thorns than flowers in her path ; but I *do* apologise for the hasty manner in which I have been obliged to prepare this paper. I would gladly have spent more time over it if a contemplated absence in Europe had not pressed me.

Fortunately, the definition of the subject is easy. Copyright is the right of multiplying copies of literary or artistic works. It is primarily applied to Books, but extends also to Paintings, Drawings, and Statuary ; and is held to embrace the cognate subjects of speeches, lectures, and of musical and dramatic representations. But copyright is *not* the property which the author has in his *unpublished* book or manuscript. That is a simple right of property, as in the case of any other moveable thing, and will be regulated by the civil or the common law. Copyright in all countries is regulated by statutes, and it commences at the instant of publication. Although the underlying principles which govern all these classes of copyright are the same, yet it is evident that the mode of applying them must vary much in the case of subjects so different as the representation of a drama, and the reprint of a book. I propose in this paper to confine myself mainly to the right of copy in books.

On this subject, as on most others, two distinct schools of thought exist; holding extreme views and fundamentally opposed to each other. The one party hold that the title in the copyright of a book is a *natural indefeasible right*, existing at the common law, and perpetual to the same extent as real property, such as lands and houses. The other party hold that it is a statutory right, granted by governments in the interests of literature, and for the benefit of society generally; and therefore existing only under statutory conditions which may at any time be enlarged or contracted. Some writers of the first, or author's school, go so far as to maintain that copyright existed under the Roman law. This view has never, however, been held in any country where the study of the Roman law has been cultivated. I have never met with more than one citation to support this statement, and that is given by Mr. James Appleton Morgan, of the New York Bar, a writer of two large volumes on the Law of Literature. He cites the "Institutes," Book 2, Title 1, chapter 33, as follows:—

“ Si in chartis membranisse tuis, carmen vel historiam, vel orationem Titius seripserit, hujus corporis non Titius, sed tu dominus esse videris.”

Mr. Morgan writes *membranisse*, which is not Latin, for *membranive*, besides altering the tense of the last verb. The passage correctly translated would read:

If Titius has written a poem, a history, or a speech upon *your* paper or *your* parchment, it is *you*, and not Titius, who will be the owner of the thing.

It was a simple case of *accessio*, and had reference only to the labour of transcription, as is evident from the context. Titius had the right to transcribe any poem he chose. Any student at law is familiar with that principle, for it is elementary in the Civil Law of Quebec. The ownership according to Roman Law followed the paper and the parchment—a very singular method of establishing the right to copy of an author. Equally unfortunate are Mr. Morgan's citations from Juvenal and Martial. They merely establish the fact known to every-

body, that there were in Rome well-known booksellers, who kept stocks of books on hand which, by the way, they sold at very moderate prices.

It is a very common error to suppose that the ancient world was very badly supplied with books, to transfer to the times of Greek, Roman, and Egyptian civilisation, the darkness and dearth of mediæval Europe. The fact is that in those days every gentleman's house had its library, and every city had its *public* library. In every wealthy household was a servant to read aloud, and another to copy books. You all remember Tiro, Cicero's freedman and very dear friend. Atticus, Cicero's other friend, kept a large number of slaves transcribing, and made a good deal of money by the sale of the books so manufactured. In those days a publisher or bookseller kept a staff of skilled slaves. When a book was to be published, one of these read, and the others wrote; and in that manner, by the means of cheap slave labour, large editions of books were published. The literary activity of the countries around the Mediterranean was very great, and we under-estimate it. Horace has preserved for us the names of the booksellers in whose shop he used to lounge. Martial refers a shabby fellow called Lupercus (who wanted to borrow his epigrams) to his bookseller Atrectus. He tells him the shop is "opposite the forum of Casar, and placards are posted outside giving the names of poets," evidently as is the custom among booksellers to this day. The price of the volume—the first book of his epigrams—he says is five denarii, equivalent to 3s. 6d. sterling. Now this first book contains 119 epigrams, or over 700 verses. It appears elsewhere that cheaper copies were provided. Martial referred to copies well rubbed with pumice and adorned with purple. The cheaper copies could be had at half that price, but this was in the best style. So that, if we compare the price with the published price in England of "Maud," or any of the original small volumes of Tennyson's poems, which were issued at five or six shillings, the Roman publisher does not seem to be much dearer than the English one. I wish especially to call your attention

to this, not as a point of archæology, but as a *fact* germane to my subject; because if there had been anything answering to copyright in those days, in any of these countries, the Roman law would have noticed it; for Roman law did not "lie about loose" in scattered cases and reports, but was a definite body of scientific jurisprudence.

Copyright, the right of copy, or simply "copy"—for these are equivalent terms, used at different stages of the growth or definition of the right—is asserted by some to be a natural right founded on a law of Nature. It is, they say, a title in perpetuity—transmissible in the same manner and to the same extent as land or houses. They point to Denmark as a brilliant example of justice, for there copyright is perpetual; and they push their arguments to an absurdity, because, carried to a legitimate conclusion, these would give to the Jews, as the only surviving representatives of Moses, a right of injunction to restrain the Bible Society from printing the Pentateuch. It may be because I am a layman, but I must confess that I find it difficult to attach any precise meaning to the expression *Natural Law*. Austin says that the *Law natural* of the Moderns exactly corresponds to the *Jus Gentium* of the Romans. As we have seen, that law is utterly ignorant of the existence of such a right. It was not known in the Middle Ages, and emerged into existence only in very recent times. It is not even now adopted among all nations. It is not a right to a necessary thing like food, land, or clothing; and, in short, it appears to have none of those marks which seem to characterise that very vague and shifting conception called *Natural Law*. Nevertheless, as those who advocate this view must have some definite position in the science of law in which to place this right, they classify it under the head of *Occupancy*. By the aid of this bold metaphor, they apply to literary property every rule which is laid down concerning the other older and more tangible things which are found in the same class. This theory, like many other theories of natural rights, will not stand the historical method of investigation.

In order to ascertain upon what ground the right of copy really rests, excluding all such vague expressions as "Natural Laws," it is necessary to inquire historically how and when this right first began to be exercised.

No record exists of authors' rights having been claimed for more than one hundred years after the invention of printing. There was no restriction in printing books, any more than there had been in copying manuscript books. Every printer printed what he chose without let or hindrance from any person. At the end of that period, however, the enormous power of the press became manifest. The stir of thought which produced the Reformation had been caused, and was kept up, by the art of printing; and when Philip and Mary came to the throne of England they set themselves to stem the tide of innovation. For that purpose they incorporated the Stationers' Company by Royal Charter for licensing and regulating the printing and sale of books, and they vested in this Company a monopoly of multiplying copies. The preamble to the Charter sets forth its object. It reads :

"Know ye, that we, considering and manifestly perceiving "that several seditious heretical books, both in verse and prose, "are daily published, stamped and printed, by divers scandala- "lous, schismatical, and heretical persons, not only exciting our "subjects and liege-men to sedition and disobedience against "us, our crown, and dignity; but also to the renewal and "propagating very great and detestable heresies against the "faith and sound Catholic doctrine of Holy Mother the "Church, and being willing to provide a remedy in this case." &c. &c.

For such objects the Stationers' Company, which, like all the other ancient trading guilds, had existed from the Middle Ages, received its charter; and powers were given to it "to search out and destroy" books printed in contravention of the monopoly, "or against the faith and sound doctrine." They could "seize, take away, have, burn, or convert to their own use "whatever *they might think* was contrary to the form of any "statute, act, or proclamation made or to be made." This

charter is still in existence, but the entry of all copyrights at Stationers' Hall is the only remaining right under it, which has not been abrogated or fallen into disuse. It was granted in the year 1555. But before that, in 1469, the Senate of Venice had commenced to issue privileges to printers. Henry VIII. had also issued them; and one sentence, in a privilege he issued in 1536, gives a clue to the origin of the right of copy. It was issued in favour of "Master Jehan Palsgrave, Anglois, "natyf de Londres et gradue de Paris," for a book which he is said "to have made with great and long continued dili- "gence; and in which besydes his great labours, payns, and "tyme thereabout employed, he hath also, at his proper cost and "charge, put in print; wherefore," continues the patent, "we, "greatly moved and stirred by due consideration of his said "long time and great diligence about this good and very "necessary purpose employed, and also, of his said great costs "and charges bestowed about the imprinting of the same, "have liberally and benignly granted, unto the said Master "Palsgrave, our favourable letters of privilege, concernirg his "said book called 'Lesclarissement de la langue françoise' "for the space and term of seven years next, and immediately "after the date hereof ensuing."

It must not be supposed that these royal privileges were always granted to authors because of their authors' rights. They were monopolies granted for various reasons, and generally to printers. Because if authors' rights were the moving causes of these patents, they would not have been granted for the works of Terence, Virgil, and other heathen writers. As the early printers enlarged their establishments they applied everywhere to the Royal authority for these privileges; and the more the ruling powers felt the power of the press, the more earnestly they endeavoured to regulate it by licences and privileges. Queen Elizabeth was much addicted to granting such monopolies. She granted to Richard Tottal a monopoly of printing law books, to Byrde, of music books, to Marsh, of school books, to Flower, of grammars, to Vautrolier, of Latin books, to Day, of Primers,

and to Symcocke, for all things printed on one side of a sheet provided the other side was white paper. This she did in the face of the Stationers' Company, who complained to no effect.

No doubt there were various good reasons for these privileges, which would appear if we had the Patents before us; but the point I want to make is, that these people were not authors, and moreover that, for the most part, these rights were granted for definite and different periods of time. No doubt authors got privileges also; but their rights flowed from the authority of the Crown precisely as to-day they flow from the authority of the Parliament. It was not supposed until long after, that an author had an inherent right of copy. In Scotland, as in France, where the civil law prevailed, the lawyers held that printing was *inter regalia*; and throughout all Europe this power of granting privilege was exercised directly or delegated to Universities, Commissions, and Bishops, and always under specified limitations.

In England it was exercised chiefly by High Commission, in the court of Star Chamber, until 1640; when, during the great rebellion, that Court was suppressed. But Parliament, unable to tolerate the freedom of the press, or, as it was then styled, the licentiousness of libels, soon passed another Licensing Act; and such Acts were continued under various conditions until 1679, when the last expired.

It was in these Licensing Acts during the Rebellion that ownership in literary property began to take shape, for these all provided that no work could be printed without the consent of the owner. The overthrow of the throne destroyed all monopolies, and in the confusion of the times the rights of authors began to emerge. Doubtless the influence of Milton was felt on their behalf; and the first evidence on record of an *author's* right of copy is in the case of "Paradise Lost." This transaction is usually misrepresented. The bargain was that Simmons was to pay five pounds cash, five pounds more when 1,300 copies were sold, and five pounds each for the second and third editions. It took seven years to sell the first 1,300 copies, and in 1680 Milton's widow sold her interest for eight

pounds more. Here, then, we have a definite and rational starting-point for the author's right to copy.

It would be tedious to trace out the various enactments of the Licensing Acts, and the greater confusion which followed on the expiration of the last one in 1679. No injunctions seem to have been granted, but there were suits at Common Law for damages. At last, in 1709, in the 8th year of Queen Anne, the first Copyright Act was passed, and it was not repealed until 1842. The title of the Act is "An Act for the Encouragement of Learning, by vesting the Copies of printed books in the *Authors* or Purchasers of such Copies during the time mentioned." The word *copies* here was the term then used for copyright, and this right was *by the Statute* then *vested* in the authors or their assigns. This statute was well called a general patent or privilege granted to authors.

Canada, and especially this province of Quebec, is not only an English country—it is a French one; and, inasmuch as the foundation of our Civil Law is derived from France, some notice should be taken of the French law. But that is very clear. It is the same story as in England, but more distinct, more unquestioned, and continued until more recent times. Renouard shows that *there were no authors' rights*. There were only Royal privileges direct or delegated. Even so popular an author as Voltaire derived very little profit from his books. He made money and became rich by speculation, not by literature. In 1777 the rights of authors began to be recognised; for in an *arrêt* issued in that year, "all printers are forbidden to print books for "which privileges have been granted during the existence "of these privileges, and even after expiry, without permission "of their authors." To show, however, how uncertain these authors' rights had been, I may add that another article in the *same arrêt* provides that "whereas many persons through- "out France had printed, and then possessed, large quantities "of books printed without any permission, and whereas great "loss would be occasioned unless such persons were allowed "to dispose of them; permission is granted to dispose of such

“stocks, but no more copies are to be printed.” At last, in 1793, when the Great Revolution had overwhelmed the monarchy, the first French Copyright Act was passed by the National Convention, and the rights of authors placed on a solid basis. The right of copy does not therefore appear in our Civil Code, because our laws date from a period anterior to the Revolution.

But soon there arose a tremendous controversy, which divided at the time, and still divides, the greatest legal minds in England into two opposing parties. I can only indicate the salient points of the question. When such men as Lord Mansfield and Lord Camden, Lord Hardwicke and Lord Brougham, adopt and vehemently urge opposing views, it does not become a layman to express an opinion. This was the question—

Does copyright exist by Common Law, *fortified and extended by statute?* or is copyright a *creation of the Statute Law?*

In Lower Canada this is a theoretical question; but in Ontario and in the Lower Provinces it might be a practical one. For the Common Law of England passed into those latter provinces; and, if copyright exists at Common Law, damages might be claimed in addition to the penalties under the statutes. In any case the question is one of great theoretical interest. As lately as 1851, in the case of *Boosey and Jefferys*, this sharp divergence of opinion appeared. In that case Lord Campbell said: “The first question discussed before us was “whether authors have a copyright in their works at Common “Law. This is not essential for our determination of the “present case. If it were, we are strongly inclined to agree “with Lord Mansfield, and the great majority of the Judges, “who in *Millar v. Taylor*, and *Donaldson v. Becket*, declared “themselves to be in favour of the Common Law right of “authors.”

In this very same case, in appeal, Baron Pollock said: “Copyright is altogether an artificial right, not naturally “and necessarily arising out of the social rules that ought to

" prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the Common Law of England." Lord St. Leonards and Lord Brougham held similar views.*

I leave this question for you to meditate upon, and will simply relate the way it arose and the decision arrived at.

After the statute of Queen Anne had been passed in 1708, it was assumed by authors and publishers that, besides their right under the statute, they had a Common Law right still existing to which the statute was, as it were, an adjunct. In 1727, Thomson, the poet, published "The Seasons," and in 1729 he assigned it to Andrew Millar. By the terms of the Act the sole right of printing was vested *in the author for 14 years and no longer*. Consequently, the copyright expired in 1741. But the assignee, Millar, went on printing undisturbed, supposing that his Common Law right survived; and in this idea he was supported by the fact that injunctions were frequently granted in favour of books of which the statutory term had expired; notably in the case of Milton's "Paradise Lost." But in 1763 Robert Taylor reprinted "The Seasons." Millar sued him, and the case came on in the Court of King's Bench before four Judges. Three of them, Lord Mansfield, and Justices Willes and Aston, decided, Mr. Justice Yates

* This divergence of opinion seems to have arisen from two fundamentally different conceptions concerning Natural Law and the Common Law of England. Mr. Justice Willes said: "The Common Law, now so called, is founded on the Law of Nature and Reason. Its grounds, maxims, and principles are derived from many different fountains—from natural and moral philosophy, from the Civil and Canon Law, from logic, from the use, conversation, and custom among men, collected out of the general disposition, nature, and condition of human kind." In the same case, Mr. Justice Yates said: "I give my opinion as a common lawyer. . . . Improvement in learning was no part of the thoughts or attention of our ancestors. The invention of an author is a species of property unknown to the Common Law of England; its usages are immemorial, and the views of it tend to the benefit and advantage of the public with respect to the necessities of life, and not to the improvement and graces of the mind. The latter, therefore, would be no part of the ancient Common Law of England. . . . The Legislature, indeed, may make a new right."

dissenting, that copyright existed at Common Law, and that the Act of Queen Anne was a cumulative remedy against infringement.

Scarcely was this decision rendered in 1770, when the whole question was reopened by Donaldson, who reprinted a book of which Becket claimed a perpetual copyright at Common Law. With the decision of *Millar v. Taylor* before him the Chancellor granted an injunction, against which Donaldson appealed to the House of Lords. By order of the House, three questions were drawn up and submitted to eleven judges.

“ 1. Whether, at Common Law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent.”

This was decided in the affirmative by eight Judges to three.

“ 2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? And might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?”

This was decided in the negative by seven to four.

“ 3. If such action would have lain at Common Law, is it taken away by the statute 8th Anne? And is an author by the said statute precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby?”

This was decided in the affirmative by six Judges to five.

On motion, this decision was adopted in the House of Lords by a majority of twenty-two to eleven. It was then that Lord Camden delivered his celebrated speech against the perpetuity of literary property, and was replied to by Lord Lyttleton. Upon this decision the law now rests, and briefly it amounts to this:

1. That an author's right over his unpublished book exists by the Common Law.

2. That publication by the author would not invalidate his Common Law right to copy.
3. That the statute takes away the author's Common Law right *after publication*, and substitutes in lieu thereof a statutory right.

Although the Act of the 8th Queen Anne was not repealed until 1842, many Acts were passed in the interval as new subject-matter arose for discussion and settlement. These were the 8th George II., concerning engravings, amended by the 7th George III., the 17th George III., and the 6th and 7th William IV. The 15th George III. related to University Copyright; the 54th George III. and 13th and 14th Victoria to Sculpture. The 3rd and 4th William IV. referred to Dramatic Compositions; the 5th and 6th of the same King to Lectures. The 5th and 6th Victoria, cap. 45, is the Act of 1842. There are also two recent statutes on international Copyright, and one concerning photographs. A very large mass truly of statutory law, which fortunately we need not further allude to.

While England and Scotland were bound by these statutes and decisions, there grew up in Ireland a large business in reprinting English copyright books. But, upon the abolition of the Irish Parliament in 1801, the Copyright Acts were extended to Ireland, and the printers there found their occupation gone. Many establishments were closed, and the whole publishing business centred in London. One remark I would like to make before proceeding to another branch of my subject. If the right to copy existed as a Common Law right, the statute of Queen Anne, which did not extend to Ireland, could not affect such right in Ireland. Why, then, was not this reprinting stopped by Common Law? This question was put by Lord Dreghorn in 1772, and I have not found the answer to it.

As I have already intimated, with the greater part of this mass of legislation we, in Canada, have no concern, for the reason that Acts of the Imperial Parliament are not binding outside of the three kingdoms, unless it is so specially provided

and enacted. Two of them only extend generally to the British Dominions. They are the 3rd and 4th William IV., cap. 15, concerning the Drama, and the 5th and 6th Victoria, cap. 45. These two Acts are in force in Canada, and I may observe here that the publishers of engravings were so well satisfied with the state of the law as it was, that they declined any interest in these two Acts, and that, consequently, engravings and prints are not protected from republication in Canada. As I have restricted my subject to Copyright in Books, we are only concerned this evening with the second of these two Acts, viz. the 5th and 6th Victoria, or the Act of 1842.

This Act, commonly called Serjeant Talfourd's or Lord Mahon's Act, was promoted by persons holding the most extreme views concerning literary property. The Colonies were then weak, and what is called "Responsible Government" had not been granted to the North American Provinces. Books were published in England at very high prices, freights were high, and communication was mostly by sailing ships; so that these provinces had from the first got their supplies of books from the United States. This Act not only forbade the reprinting of English books in the Colonies, but it prohibited the importation of reprints from foreign countries, and the colonists suddenly found themselves cut off from any available supply of books. An outcry arose from all parts of British America. In Nova Scotia the House of Assembly passed an address to the Queen. In New Brunswick the Government protested through the Lieut.-Governor. In Canada remonstrances were drawn up and forwarded. But the Board of Trade gave no hope of mitigation. The colonists were informed that the publishers were preparing cheap books for them. At the urgent instance of the Home Government some of the publishers did prepare a cheaper series of books. Such a series was Murray's Home and Colonial Library, but it consisted of old books only. It contained none of the new and fresh books which the colonists wanted. The publishers, fortified by the new statute, settled themselves down to their interests in the narrow kingdoms of the British Isles. They

prepared books only at extravagant prices, to be lent by circulating libraries. They completed their work of turning the English people into a people of book-borrowers, and they did not care that the sparsely settled colonists of America could not be supplied by libraries, but would have to buy books or do without reading. The absurdities of the English book-trade are, owing to this system, almost incredible, and establish the truth of Lord Macaulay's words that copyright is monopoly. For instance, a leading historical work is published in Paris with profit to the author at 9 francs. The French copyright edition is sold in London at 9s. sterling, but the translation under the International Treaty is sold at 16s. Such was the system which the Act of 1842 sought to impose on the Colonies.

And for a few years it *was* imposed upon the Colonies. In those days the Colonial Post Office was administered by British officials, and Imperial officers responsible only to England watched over, in our custom-houses, the execution of Imperial laws. They examined the baggage of travellers and the packages of booksellers, and seized all United States reprints of English books, and all magazines containing matter derived from English sources. In Montreal especially they were very active. Every case or parcel for a bookseller was opened, and the title-page of each book was carefully compared with a voluminous printed list of many hundred folio pages. If the title was found in the list, the book was seized and burned. The booksellers suffered, but the public got their books as before, for the trade was diverted into the hands of travelling book-agents. In process of time the booksellers adapted their business to the circumstances; and it grew into a war of wits between them and the Imperial officers. One official made seizures from the shelves of the booksellers' shops, and threatened domiciliary visits to private houses. On one occasion, vexed at his inability to stop the import of American reprints, he seized the *Laprairie* steam-boat for bringing them over the river with the other imports into the city. At that time "Macaulay's History of England"

was the book in greatest demand. The American edition was 75 cents a volume; the English edition was 5 dols. Every house had a copy of Macaulay, but the English edition of it was a curiosity. Such was the state of things which the English publishers would like to have revived in Canada, and suggested to our Government in 1869.

Where a whole community is determined to disobey any given law, the repeal of that law must soon come about, and in this case the antagonism was heightened by the arrogance of the Imperial officers. The Canadian Government in one or two cases issued permission to return some books which had been seized, to the United States; but the English officer refused to give them up and burned them. At last, in 1850, the Custom House was fully handed over to the Canadian Government, and the last Imperial officer departed to England.

During this time urgent remonstrances were incessantly made by the Provincial Governments. The Imperial Government replied that the measure was not a Ministerial one, but had been adopted by Parliament on the suggestion of an individual member. Mr. Gladstone, then Colonial Secretary, requested the Board of Trade to represent to the publishers, "*in pointed and not qualified terms*," the importance of modifying their exclusive views, and of making some provision for the intellectual needs of the Colonies. Finally, in 1847, the Imperial Parliament passed an Act authorising Her Majesty to issue an Order in Council to suspend that portion of the Act of 1842 which related to importing reprints from abroad whenever any Provincial Government made provision for the rights of authors by imposing a special duty for their benefit. The Canadian Government imposed a duty of $12\frac{1}{2}$ per cent., which still appears upon our Tariff. This was accepted by the English Government as satisfactory. The Order issued, and in consequence, the only portion of the Act of 1842 which now is in force in Canada is that which prohibits reprinting; and this it is which restrains the Toronto publishers from reprinting Mark Twain's last book.

Having thus brought down the history of Copyright to the present moment, I pass to the consideration of the actual state of the Statute Law of Canada. I will only premise by saying that in all these questions you must carefully distinguish between the *Common Law* or *Civil Law* right of every author to the entire control of his work (written or printed) before publication, and his *statutory right* or *monopoly of multiplying copies after publication*. It is only the latter which is properly called Copyright.

COPYRIGHT IN CANADA.

There have been several Copyright Acts enacted in Canada. Acts were passed in 1841, in 1847, in 1868, and lastly in 1875. Inasmuch as this last Act repealed all the others, I will confine my remarks solely to its conditions.

As I stated before, the Imperial Act of 1842 contained a new and unusual clause, extending its operation to every part of the British dominions. It consequently follows that any Canadian Act must be read concurrently with the Imperial Act; and, wherever the two Acts are found to clash, the Canadian Act must give way. It happened that the Government which passed the Act of 1875 called in the assistance of persons practically acquainted with the publishing business; and the Act was drawn so that no clash can occur between them; but, as the conditions vary, an author may obtain protection under one which is refused by the other, as in the case of Mark Twain. The co-existence of two distinct laws in Canada has led to much confusion and disappointment; but the principles which guide them are simple enough. These I will give, rejecting details, which anyone may pick up from a perusal of each statute.

And 1st, the Imperial Act: The essential condition of this Act is that publication must *first* take place in the British Islands proper. Publication in Canada, or in any other Colony, is of no avail. The object of the Act as laid down in *Low v. Routledge* is to induce foreigners and others to publish in Great Britain, and it protects only those who do so. And yet so selfish

were the framers of that measure, so reckless of the interests of all but English manufacturers, that they made it extend over the whole Empire. They were determined to centre the printing trade in the British Isles.*

For a long time it was a doubtful question whether foreigners could obtain Copyright in England unless resident there at the time of publication. Upon this turned the great case of *Jeffreys v. Boosey*. In considering this decision care must be taken to remember that the assumed right originated in 1831, when Queen Anne's Act was in force. Bellini, a foreigner resident in Italy, assigned in 1831 to Ricordi his copyright in the opera *La Sonnambula*. Ricordi brought it to London and sold it to Boosey. Jeffreys reprinted it, and Boosey brought him before the Court of Exchequer, where Baron Rolfe, afterwards Lord Cranworth, presided. The decision went in favour of Jeffreys, but on appeal before Lord Campbell it was reversed. The case was carried to the House of Lords. Eleven judges gave their opinions. Six declared that in order to obtain copyright a foreign author *need not* be present in England; and five, that no matter how temporary, there *must be residence at the time of publication*. The six judges were Erle, Williams, Coleridge, Maule, Wightman, and Crompton. The five were Lord Chancellor Cranworth, Jervis, Pollock, Parke, and Anderson. In the House of Lords, Lord Brougham and Lord St. Leonards sided with the five judges, and the final decision was given in favour of Jeffreys. This became the leading case on Copyright, and was followed in subsequent decisions; but a question again arose. It was admitted that first publication in the

* In 1824, in *Clementi v. Walker*, the principle was laid down that the printing must be done in Great Britain. Lord St. Leonards, in *Jeffery v. Boosey*, held the same view. Baron Pollock said: "The object of the Legislature clearly is not to encourage the importation of foreign books and their first publication in this country." Lord Chancellor Cranworth also connected the idea of printing with publication. He said: "If a foreigner, having composed, but not having published, a work abroad, were to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute."

British Islands is necessary—is, therefore, residence *in those islands* also necessary?

The case of *Low v. Routledge* in final appeal settled that in the negative. It decided that the residence of the author, no matter how temporary, *anywhere in the British dominions*, while his book was being published in England, was sufficient. Lord Cairns and Lord Westbury went so far as to say that prior publication without residence was sufficient, but to this extreme view Lords Chelmsford and Cranworth did not assent.

One other condition of the Imperial Act remains—the book must be registered at Stationers' Hall, but this registration is only necessary prior to the commencement of an action. The omission to register does not invalidate the copyright. A book can be registered after its publication, but it must be registered previous to an action at law.

Under the Imperial Act, as interpreted by *Low v. Routledge*, many celebrated American authors have secured a copyright over all the British Dominions. Many of them have come with letters to my own house. Among them were Dr. Oliver Wendell Holmes, Henry Ward Beecher, Mrs. Whitney, Miss Smiley, Ex-President Jefferson Davis, Bayard Taylor, P. T. Barnum, Miss Cummins, upon whose book the celebrated decision was given; and last of all, Mark Twain. One case is so peculiar that I must mention it more specially. Mr. Kwong-Ki-Chu, a Chinese gentleman attached to the Chinese delegation residing at Hartford, wrote a very remarkable book—a supplement to all existing English dictionaries. He is a good English scholar, and had devoted years to the elucidation of idiomatic and colloquial expressions, as well as of slang and cant words not found in any dictionary. These he analysed and explained in good language. He appended to his book a collection of Latin and French phrases, a short history of China, a Life of Jesus, and one of Confucius, and a collection of Proverbs, Chinese and English. It made a volume of 900 pages. He procured a copyright in the United States by a transfer before publication to United States

citizens. Then he was anxious lest his book should be reprinted in Hong Kong, so he published it first in London and resided for a week in Montreal, by that means effectually barring the Hong Kong printers from pirating his work, which he intended chiefly for sale in China. He is a singularly intelligent man. His book is amusing, for it is difficult to suppress a smile on reading an elaborate explanation of such expressions as "to stick in one's gizzard," "to tip a fin," "to vamoose," "to see the elephant," &c. &c.

One point remains to be noticed in the English Act, and it is very important. The framers of it were very careful to demand first *publication* in Great Britain; but they omitted to mention the word "printing." It consequently follows that an American citizen can procure British copyright by sending his author to Canada and his manufactured books to London; while an English or Canadian author cannot procure copyright in the United States under any condition short of *bonâ fide* citizenship or domicile.

I come now to the Canadian Act of 1875. Those who had to do with the framing of that Act were perfectly familiar with the state of the English and American law. They could not touch the Imperial Act, so they ignored it. They were careful not to allude to it in any way while avoiding collision with it. So jealous are the English publishers of any Colonial copyright legislation that the Act was reserved by Lord Dufferin under special instructions. On its arrival in London the customary storm of misrepresentation and abuse broke out in the "Times" and other London newspapers. The Publishers' Association sat upon it, and various legal luminaries were called in. But finding that the Act was strictly a local Act, within the powers of our Parliament, the Queen was advised to assent to it, and the following year it became law.

The first principle underlying the Canadian Act is that of reciprocity. It concedes to other nations the same privileges which other nations concede to Canadians. The United States demand that all who avail themselves of their law shall be citizens or residents, and they refuse international copyright.

to other nations. The Canadian Act, in describing the status of those who come under it, specifies : " All persons *domiciled* in "any part of the dominions of Great Britain, or who are citizens "of any country which has an International Copyright Treaty "with Great Britain," and only those, shall share in the benefits of the Act. Mark Twain did not fall under either of these categories, and the Canadian authorities were quite right in refusing his copyright. If the papers had been issued they would have been worthless at law. Those who advised the Government in drawing up the Canadian Act, knew that the word *resident* was interpreted by the United States courts in the narrowest sense—to signify a person residing in a country *animo manendi*; and they knew also that the English courts held the word, in its widest possible meaning, to signify the mere momentary presence of the author at the moment of publication. They crossed the word *resident* out of the draft bill and inserted the word *domiciled*, for the purpose of making the law in Canada precisely correspond to the law in the United States. In making his first application Mr. Clemens acted under the advice of a distinguished Boston lawyer, who was not aware of the distinctness and precision of the word "domicile" in the Civil Law. He was misled by a false induction from our Patent Act, and by a false induction from the case of *Low v. Routledge*, which had no reference to our statute. He was misled, as all lawyers will be misled who (even if they live in Boston) presume to advise upon the laws of foreign countries. Mr. Clemens, however, could fall back upon the Imperial Act, by virtue of which he now holds his book. We are then face to face with a startling anomaly—the Copyright which our Parliament refuses, the English Parliament grants, and the book which cannot be printed in Canada without the author's consent, can be imported from abroad.* In many respects Mr. Clemens is entitled to sympathy; for

* This has, in fact, been since done. Debarred by the Act of 1842 from printing this book in Canada, the work was printed out of the country, and the sheets, worked off there, were then imported into Canada on payment of the 12½ per cent. duty previously referred to.

the Toronto people were very aggressive, even advertising in the United States papers to supply their cheap editions by post on receipt of the 20 or 30 cents of price. But then the Americans have the remedy in their own hands. The moment an International Treaty is made they will come under our Statute by its very terms. They cannot hoodwink the Canadians as they do the English people, and I am sure they will never get from the Canadian Parliament anything but reciprocal rights.

There is, however, in the Canadian Act another condition. It is that the book protected shall be printed and published in Canada. When the framers of the Imperial Act of 1842 passed their measure they never thought that publication could be effected by importing a few dozen copies of a foreign manufactured book. But, under the influence of free trade notions, their statute has been so pared down by decision upon decision, that I confidently believe that any American, by simply sending over fifty copies of his book to London with an English imprint on it, and publishing there twenty-four hours before he published in America, would secure a monopoly for his book throughout the British Empire. The Canadians do not understand this, and their Act is drawn so as to secure the printing of the book. The stereotype plates may be imported, but they must be applied to the paper in Canada to come under our statute.

The other conditions of the Canadian Act require very little notice. Two copies of each book must be sent to the Department of Agriculture at Ottawa, one of which is deposited in the Library of Parliament, and a notice of registration under the Act must be printed on the title-page, either on the front or back of it. The other conditions are merely administrative.

There are, however, some peculiarities in our Act worthy of mention, because they do not occur in the Copyright Law of other nations.

1. The Canadian Act does not demand prior publication, but an author, at any time, may print and copyright his book in Canada. Thereupon it becomes unlawful to print or import any more copies of unauthorised editions; but the copies already

in the country may be disposed of. There is a proviso, however, that the original author's edition can always be imported. The object of this proviso is to prevent a Canadian publisher issuing a cheap and bad edition of a book, and shutting out of the country the superior and authentic original editions. It was enacted in the interest of the reading public. The United States Law also does not demand prior publication, but it must take place in a reasonably short time.

2. The Canadian Act is peculiar in permitting Interim Copyright. The object of Interim Copyright is to prevent importation of a book which is passing through the press in Canada. A notice must be inserted in the "Canada Gazette" that an Interim Copyright has been secured. A copy of the title must also be deposited in the office of the Minister of Agriculture, upon which the work is protected. But if the person who takes out such a copyright fails to print the book specified within thirty days after its publication by the author elsewhere, he forfeits his right, and becomes liable to a heavy penalty. The object of this clause is to prevent fraudulent entries, made simply for the purpose of keeping the public from supplying themselves with a new book; while the author, not intending to publish in Canada, is publishing it elsewhere.

3. The Canadian Act provides for Temporary Copyright. This is intended to cover the case of works published in serial form, either in numbers or in newspapers or magazines. The title and a short analysis of the work must be registered at Ottawa. Each separate article or number must also contain notice of registration. Such works when published must comply with the conditions of full copyright, although they may have been registered under the Temporary or Interim Clause.

These are the chief peculiarities of the Canadian Law. It would render this paper too long if I were to enter upon the various provisions relating to music, painting, sculpture, drawings, maps, photographs. The underlying principles are the same. There must be registration, and the public must have notice of it in some way. In this respect our Act is very

much superior to the English Act. It is almost impossible to know when a book is out of copyright in England. It may not be registered at all, but if anyone, relying on such an omission, imports or prints, the author or his assigns may spring up, register and prosecute. By the mere inspection of a Canadian book the fact and date of its registration can be known. One more remark and I have done with this branch of my subject: The department at Ottawa does not undertake to verify the statements contained in the documents submitted to it. It only demands that they shall be in due form. But if anyone prints upon a book a certificate of registration based upon false statements—if, for instance, the book in question is not printed in Canada, or if the author does not belong to the classes indicated by the law, or if the registration is omitted, or if the title be not legally vested in the applicant, &c. &c., the person who thus misleads the public, or imposes on the department, becomes liable to a heavy fine, and is guilty of a misdemeanour. This is not so well known as it ought to be, and printers put the copyright notice oftentimes on their titles pretty much as they print their own names. In giving advice on a question of copyright, a lawyer should ask to see a certified copy of the entry.

It might be asked, where is the need of a Canadian Act if the Imperial Act is in force in Canada? It is needed because the English Act is drawn solely in the interest of British publishers. If a Canadian author publish his book first in Canada he loses Imperial copyright. Consequently our Act was passed to confer local copyright, conditioned on local publication; and, moreover, it is only under our local law that importation can be prevented. Consequently, if a Canadian author takes the option of publishing under the English Act alone, his book may be set up, say at Rouse's Point, and imported on payment of a duty of $12\frac{1}{2}$ per cent, additional to the regular 15 per cent. on all books.

Take it all in all, the Canadian Act has worked well. Under its protection many English books have been reprinted in Canada with the author's consent, and the United States

editions of these books have been excluded. It is not the fault of the Government which passed that measure that the Imperial Act still hangs over us. They could not repeal it. The Imperial Parliament alone can do that, and the influence of the writing class, and of publishers who control the organs of public opinion, is so great that nothing short of a little rebellion will secure its repeal. Our Act is also defective in that it does not provide for an action in damages. The extreme penalty is one dollar per copy for every copy of a pirated book found, but it is very difficult to find many copies together. Those who sell them keep their stock hidden and show but one copy at a time, and there seems to be no way of discovering how many were imported or printed excepting by ferreting out the matter through a detective. Our Act, moreover, has no provisions for musical performances or dramatic representations. The drama and the music when printed are protected from reprint; but to prevent representation after printing, some other method of action must be adopted. What it may be I do not know.

The power of the Imperial Act of 1842 to prevent the reprinting of English works in Canada has not been unquestioned. It was fully discussed in a case decided about five years ago in Toronto, which will be found in vol. 23 of Grant's "Chancery Reports," under the name of *Smiles v. Belford*. Smiles was the well-known writer of "Self-Help," who had written and copyrighted in London a new book called "Thrift;" and Belford was a publisher in Toronto, who reprinted it without his leave.

For the defendant it was argued, with a good deal of plausibility, that, whatever the law might have been in 1842 or later, the confederation of the provinces, and the concession of complete freedom of legislation under the British North America Act, had changed it. For among other subjects ~~which~~ as under the control of the Dominion legislature copyright was enumerated. Now, that Act being an Imperial Act, by the insertion of copyrights among the powers it specified, it abrogated the former Act of 1842 as regards

Canada, and conceded to the Dominion Parliament plenary power over the whole subject within the Confederated Provinces.

The Vice-Chancellor did not concur in this view. He decided that the British North America Act was not intended to affect the external relations of the Dominion with the other parts of the Empire ; and that its object was to effect a redistribution of powers which the Provinces already possessed. The copyright enumerated in the Act was simply Dominion Copyright, and this, by the Act, was taken out of the powers already exercised by the Provinces and centred in the Parliament at Ottawa. He also decided two other important points. He said :

“ It is not necessary for the author of a book, who has duly copyrighted the work in England, to copyright it in Canada, with a view of restraining a reprint of it there; but if he desires to prevent the importation into Canada of pirated copies from a foreign country, he must copyright it in Canada.”

He also decided that—

“ Before the author of an English copyright book is in a position to take any proceedings for the protection or to prevent the infringement of the copyright, he must register his book under the 24th sec. of the Imperial Statute 5 and 6 Vic. ch. 45.”

This decision has not been carried to the highest Court of Appeal. It is difficult to see under what pretext it could be assailed.

The Canadian people, having freed themselves from one-half of the Imperial Act, rested for a long while content; but, as the country prospered, the printers and publishers grew restive under the remaining restrictions. They felt it hard that, while the American reprints could be imported, they were deterred by the Act from sharing in the profit of reprinting. The Government adopted their views, and in 1872 passed an Act empowering anyone to reprint English copyright works without the consent of the author, upon payment, through the Government, of a royalty to the author of $12\frac{1}{2}$ per

cent, on the wholesale price. This would have placed the Canadian printer in as good a position as the United States printer, and would have secured to the author the same royalty. The Act was reserved, and never became law. The English authors and publishers took violent exception to the proposal to take away their property without their consent, even on payment. Much correspondence passed upon this question, both before and after the passing of the abortive Act of 1872. Resolutions were adopted by the Houses of Parliament in Canada urging on the British Government the propriety of giving Imperial sanction to this Act; but Lord Carnarvon replied that he could not advise the Royal assent to an Act which traversed an Act of the Imperial Legislature; and, even if the Royal assent had been given, it would have been invalid, inasmuch as, by the 2nd section of the Colonial Laws Validity Act, any part of a Colonial Law which is repugnant to an Imperial Act, extending to the Colony in which such law is passed, is *pro tanto* absolutely void and inoperative.

During the discussion of this branch of the subject of copyright, the Canadian Government forwarded a minute of the Privy Council adopting a report containing the following principle:—

“ The important point at issue, and one on which the views of the London publishers, and of the people both of Canada and the United States, are irreconcilable, is, that the former insist upon the extension of copyright without local publication, and to this the latter will never consent.”

This minute was adopted in 1870, and the Report was signed by the late Judge Dunkin, then Minister of Agriculture, and by Sir Francis Hincks, Minister of Finance. The whole kernel of the dispute is contained in that sentence. The same question is coming up again during this Session of Parliament; for counsel has been retained (so at least the newspapers say) by some leading publishers to argue the case before the House, and to move an address to have the remainder of the Act of 1842 repealed. You will no doubt hear about it soon. One thing only I would beg you to

remember, that no one in Canada proposes to rob the author of remuneration for his labour. No Canadian Government would listen to such a proposal. The real question underlying all this noise and dust is a trade one. It is, who shall manufacture the books? The authors are the blinds for the publishers and printers. Authors' rights and the perpetual sacredness of literary property, with the rhetoric thereto adhering, are delusive cries which manufacturers unconsciously take up when urged by their material interests.

I pass now from the consideration of the Statute Law to discuss some general principles which underlie the whole subject. The decisions in Canada have been few, but as the business of printing increases, questions will more frequently arise.

It cannot be too frequently repeated that the law laid down in *Donaldson v. Becket* has been followed in every decision since. Whatever theoretical views writers may entertain, the principle adopted and embodied as law is that the Copyright Statutes take away an author's Common Law right to his work, and substitute for it a statutory right. It is important then to inquire at what moment this substitution takes place. In the case of *Jeffreys v. Boosey* the Lord Chancellor Cranworth used these words: "Copyright, defined to mean the 'exclusive right of multiplying copies, commences at the instant 'of publication.'" In the same case Mr. Justice Crompton said: "The monopoly is vested in the author and his assigns for the 'limited term after first publication. This first publication is 'the commencement and foundation of the right, the *terminus* 'a quo of the period of the existence the right is to run, and 'a condition precedent to the existence of the right."

What, then, is publication? It is the distribution to the public by gratuitous circulation, or the offer for sale to the general public of copies of any literary or artistic work. If one copy be offered, with the consent of the author, in a book store, even if it be not sold, it is publication. But the unauthorised sale of pirated copies is not publication as regards the author's rights. Neither by the English law is the private

circulation of a limited number of printed copies. This was illustrated in the case of *Prince Albert v. Strange*, when the Queen and the Prince had given to intimate friends lithographs and etchings of their own drawings, which Strange had got hold of and published. A question might arise in Canada, however, upon this point, for the Canadian statute in the third section has provided a remedy for printing a manuscript without the author's consent, but leaves such a case as that of *Prince Albert* unprovided for. The English statute leaves all unpublished matter to the operation of the Common Law. The reading of a lecture from a manuscript is not publication, no matter how many times it may be read, nor is the public performance of a drama or a musical work a publication in the meaning of the statute. The case of *Bray v. Devins* illustrates this. It was a very peculiar case, and the current opinion among lawyers in Montreal was that Mr. Bray could not recover damages. In addition to printing Mr. Bray's lecture without his consent, Mr. Devins invented an original method of advertising, by imbedding in the text of the lecture advertisements of patent medicines. It was proved that Mr. Bray read from a manuscript, and the manuscript was produced in Court. Judgment went against Mr. Devins for three hundred dollars damages—two hundred for damage caused by publication without the author's consent, and one hundred for injury to his feelings and reputation by insertion of the advertisements. This decision seems to have been under the Civil Law. The first part of it might have come under the 3rd section of the statute, which enacts—
“If any person prints or publishes, or causes to be printed
“or published, any manuscript whatever, the said manu-
“script having not yet been printed in Canada or else-
“where, without the consent of the author or legal proprietor
“first obtained, such person shall be liable to the author
“or proprietor for all damages occasioned by such publi-
“cation to be recovered in any court of competent juris-
“diction.” The case was a very amusing one. The literary
experts of Montreal, and many very *inexperts*, were summoned

as witnesses. The extent of this Clause 3 is very wide. It covers "any manuscript whatever" of any nature—not only lectures, but letters, whether marked private or not. Very loose notions are prevalent about the publication of letters, but it is an admitted principle in Copyright Law that the *right to copy* in letters is in the writer.

Another principle very clearly pervades the law of literature, and that is, the property must be definite. Consequently, there can be no Copyright or property in extemporeaneous speeches, conversations, or lectures, not reduced to writing. Ideas are not the subject of Copyright, but words are. In the case of *Abernethy v. Hutchinson*, where a student took down a professor's lectures and printed them in the "Laneet" newspaper, Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing; but he granted an injunction on the ground of breach of confidence. There is a special English statute concerning lectures, but it does not extend beyond Great Britain. John Bright and Lord Macaulay were much aggrieved by a publisher who reprinted their speeches from "Hansard" and the newspapers of the day. They had no remedy, but it induced them to publish what they declared to be a true version of their speeches. The publishers, however, demonstrated that passages had been omitted which reflected severely upon some statesmen who had since become political friends of the speakers, and that their editions, although unauthorised, were the more correct.

Again, in order to be subject to valid Copyright a work must be new. The matter may be new and the arrangement old, or the plan and arrangement may be new and the matter old. In either case the work would be protected. There must be originality in one way or the other. This branch of Copyright Law is very difficult. The leading principle is that either in material or arrangement, or in combination of both, the writer must employ his own labour, judgment, and skill. He must not copy from another. An abridgment of a copyright work is permitted, but it must be a *real condensation*, not a

mere cutting down of the larger work, using the same words. Dictionaries and works of reference of that nature may be used and extracts made, but no material part must be taken. An entire article, for instance, from a dictionary of biography would not be permitted. So in the case of a collection of poetry, where four or five of Campbell's poems were taken entire, an injunction was obtained. Tennyson's poems are protected by law, but anyone may compile a concordance to Tennyson, which would also be protected. Another person might go over the same work and make another concordance—he might even use the first to check his own work by—that also would be protected. An illustrative case occurred in Canada. A mercantile agency had compiled a reference book, containing the names of merchants in different towns, with marks designating their capital and standing. Another agency published a book for a similar purpose with a different system of marking. The first agency asserted that the second had reprinted their book instead of compiling the matter anew. The cause went to proof, when it appeared that agency No. 1 had inserted in its book a fictitious village, with an imaginary storekeeper, blacksmith, innkeeper, and various non-existent artisans, such as are usually found in a small village. This, agency No. 2 had inserted in its book, and, when asked in court to point out on the map the village which its agent had so carefully reported, the manager was fairly puzzled. The suit was unsuccessful, because agency No. 1—although the notice was printed in due form on the back of the title-page—had failed to comply with the law and register at Ottawa. Owing to that omission, the book became public property.

Another admitted principle is that Copyright is divisible. This is well shown in the case of *Low v. Ward*. While the last six chapters of "The Guardian Angel" were passing through the press at Boston, the author, Dr. Oliver Wendell Holmes, came to Montreal and stayed a week at St. Lawrence Hall. During that week the complete work appeared in London, prior to its publication in Boston. Ward and Lock reprinted

the book from the "Atlantic Monthly," but Lows obtained an injunction because they had a transfer of valid copyright in the six concluding chapters, which were first published in England during the author's stay in Montreal.

The law has always made a distinction between literary property and other property, and in spite of all that has been written this distinction is both necessary and just. It is in itself right and proper to reward literary labour; and it is moreover to the interest of society generally that authors should be encouraged to write, precisely as inventors are stimulated by the Patent Laws; but an author does not create a new thing by his own labour. Much of his work is of necessity borrowed. Chaucer took his "Canterbury Tales," some from Gower, and generally from Boccaccio, Petrarch, and the Italian story-tellers. None of Shakespeare's plots are original, and of Milton's "Lycidas," not only the framework, but whole lines are adapted from Theocritus. If this be the case with the great writers, how much more do the smaller ones enter in upon the labours of their predecessors! The number of original works is very small; and if the conditions demanded by the title of *occupancy* were strictly enforced, there are very few works in the world which would comply with its requirements. If copyright and patent right were perpetual, the whole intellectual and physical world would be parcelled out by inheritance into small holdings, interlaced so that the Courts and Judges would be occupied for ever in interminable discussions upon intangible things. The claims put forward by the writers on this subject will not bear investigation. They are for the most part special pleaders, and they go too far afield for their illustrations. Thus Mr. Drone is arguing for the perpetuity of literary property as the result of labour, and he adduces an incident in the Book of Genesis, where Abraham digged a well; and he says that Isaac one hundred years later successfully vindicated his claim to it because his father dug it.

This excursus into Philiscine law is characteristic of much of the writing upon this subject. It is law run mad. Upon

the laws of the Hittites, Hivites, Perizzites, or Jebusites, 4,000 years ago, Mr. Drane is no better an authority than Mr. Morgan on Roman Law. If there be one thing clearer than another in the whole Book of Genesis, it is that the only real estate which Abraham possessed in Palestine was the field he bought of Ephron the Hittite. The elaborate forms by which the purchase was made are worthy of study, as throwing light on early property law. Abraham was a nomad, and lived by his flocks and herds. He went from place to place, and it is expressly recorded that he dug many wells. If he had not, his cattle would have died. At this special well at Beersheba he remained for a long time, and there he made covenant with Abimelech, whose servants disputed with his servants for the use of the well. There was a ceremony which gave Abraham a *right of use*, but certainly no transfer of title in perpetuity, as in the other case. Abraham dug wells all over Palestine, and when Isaac came afterwards to these wells he found them filled up, and on attempting to clean them out he was driven away. Abraham could no more have acquired a title by digging a well on another man's land then than he could by building a house upon another man's land now. Such *à priori* writers are really would-be legislators, drawing the law from their own inner consciousness. The fact simply is that literary property is a recent creation, first of prerogative, then of statute—reasonable, just, and right—and that, in creating it, the law has put such limitations upon it as are necessary for the general good. We have seen that the first privilege on record, which was granted by Henry VIII., was for 7 years; the Act of Queen Anne was for 14 years; the Act of George III. was for 28 years; the Act of Victoria was for 42 years; the proposed new Act is for 50 years. The time is continually extending, and the copyright holders are still dissatisfied, and clamour for a perpetuity of monopoly. Few copyrights, as a matter of fact, are held by authors. They are held by capitalists, the large publishing houses, who would like them to go down from generation to generation. Jacob Tonson set up his carriage

out of Milton's "Paradise Lost," for which Mrs. Milton got eight pounds. I am not arguing against literary property, nor against the just right of an author to his reward. Those who enjoy the fruit of his labour should pay for the privilege; but I am arguing against the demand to enclose in perpetuity the common ground of intellectual life; against the demand to vest in the descendants of authors, or of capitalists who have bought up authors' rights, a property which *they*, at least, did not create; a property, moreover, intangible, difficult to define and keep separate, and which in a few generations would become hopelessly intermingled. Then, also, many great works might be suppressed as opinion changed from age to age, and a Puritan heir might suppress the works of Shakespeare, or a Jacobite lock up or expurgate the works of Milton. So far was the Parliament of Queen Anne from supposing that literary property was of so sacred a nature, that they inserted in their Act a clause by which anyone of a number of high officials could reduce the prices of books which might be thought unreasonably high; and this was in the very first Copyright Act ever passed by any nation. The reasons for the limitation of the right of copy were stated very clearly by Napoleon I. He said that—

"The perpetuity of this property in the families of authors would have disadvantages. A literary property is an 'incorporeal property which, being in the course of time and by the process of inheritance subdivided among a multitude of individuals, would end so as to exist for nobody; for how could a great number of proprietors often separated from each other, and scarcely knowing each other, combine and reprint the works of their common author? Nevertheless, if they did not do so, and they alone had the right to publish, the best works would insensibly disappear from circulation."

The only persons who would be benefited by perpetuity of literary property would be the great publishing houses and corporations, and the dominion of capital would be extended into the intellectual world by a species of literary syndicates.

As this subject is likely shortly to occupy the attention of

Parliament, it may be well to mention some of the leading writers upon it; and here I may remark that I have never met with any law books which are so rhetorical in their style as those upon this subject. They are all upon one side, and it is only on reference to the full reports of leading cases, or in the quotations which are incidentally given from the opinions of dissenting judges, that one can gather the possibility of there being two sides to the question. We read of "the sound and enlightened views of Lord Mansfield;" he is described as delivering "one of the grandest judgments in English judicial literature;" that is the same judgment which was overruled in the House of Lords. Then we read of Lord Camden's "specious harangue"—of Lord Macaulay "groping in a fog, and not understanding the matter upon which he was speaking"—of the "ignorance and sophistry" of those great men who unfortunately differ from Mr. Drone or Mr. Morgan. But Lord Macaulay really did know a good deal about both history and literature—and Lord Camden knew a deal of law—so did Sir Joseph Yates, and Lord Brougham, and Lord St. Leonards, and Lord Ellenborough, and Lord Cranworth, and Chief Baron Pollock.

It is not to be wondered at if a species of property first heard of in the seventeenth century should cause differences of opinion among lawyers and historians. Weakness of reasoning is not disguised by warmth of rhetoric; and it is a defect common among writers upon this subject to state what in their opinion the law ought to have been, rather than what it is. Of the English books I think "Copinger on Copyright" is the most useful. Shortt on the "Law of Literature" is a good book, but I cannot speak from intimate knowledge. Mr. Sidney Jerrold has lately published a very handy epitome of the English and Foreign Law. Among American books, Drone on "Copyright" is beyond question the best. Mr. James Appleton Morgan has collected a mass of useful materials in his two large volumes on the "Law of Literature." It is useful for its citations, but the Latin and French quotations contain many errors. There is another older book, "Curtis on Copyright," held in much

esteem. I once had it, but it was borrowed from me years ago for a case then coming on, and I saw it no more. I remember it well—it contained much good exhortation about the sacredness of literary property. There is no doubt about my "Curtis" being protected by the Common Law, and I hope the legal conscience of the borrower will check him every time he takes the volume down.

And now, Mr. Chairman and Gentlemen, I hope I have not wearied you. I hope I have not left your minds in the same condition as that of a celebrated Minister of State in England who had listened for an hour to a deputation about Copyright. "Gentlemen," said he, "before you commenced I thought I knew a little about Copyright; now I know I never did know anything about it; and what is more, I never shall."

APPENDIX.

A perusal of the preceding pages will probably convince the reader that the Law of Copyright in Canada is in a very confused state. The Canadian Government has from time to time made efforts to introduce the system of compensation to authors by means of royalties. The abortive Act of 1872 (*see* p. 27) was based upon that system.

It is admitted on all sides that the Act of 1842 is a failure as regards Canada. It contains provisions which are impracticable. The Law Lords decided, in *Low v. Routledge*, that first publication must take place in the United Kingdom. Therefore, books first published in Canada are unprotected; and yet, by the terms of the Act, every publisher throughout the British Dominions is bound, under a penalty of £5, to present to the British Museum a copy of every book he issues; and also to present copies, if demanded, to the Bodleian Library at Oxford, the Public Library at Cambridge, the Advocates' Library at Edinburgh, and Trinity College Library at Dublin. The special duty of 12½ per cent. upon the importation of reprints is exceedingly difficult and uncertain in collection, owing to the extent of the frontier and the incessant travel to and from the United States. The book-post has opened up new channels of import through hundreds of small post-offices. Moreover, reprints come in mostly in small numbers, and the collecting and accounting for the trifling sums due upon single copies would require an enormous staff of clerks. In these days of 10 cent. and 20 cent. libraries passing like newspapers through the mails, the collection of such a duty becomes impossible. It is only possible when books are imported in long numbers.

The Canadian proposals for a royalty upon reprinting met with favour in many quarters in England. The Blue Book of the Copyright Commission abounds with references to it; and an Act was even drafted (*see* Sess. Papers, 1874) in England, embodying that principle. It was proposed, however, by the publishers that only presses specially licensed should be permitted to reprint British copyright works; by that means they hoped to confine the business to responsible persons. Anyone conversant with Canada will know that Government could not limit the number licensed to reprint. The pressure on members would be such that it would result practically in a general licence. The abortive Canadian Act of 1872 stipulated for a royalty of 12½ per cent. on the *lowest whole-*

sale price of the book reprinted. The English copyright owners objected to this as being a vague and indefinite amount, and they doubted also the ability of the Government to collect this tax any more than the import duty.

Yet there is a method of meeting all these objections and of fulfilling all the necessary conditions. The royalty must be a definite and reasonable sum—it must be certain in receipt—it must be easy of collection so as not to involve a large and expensive staff, and the licensing of special persons must be avoided. The plan suggested is as follows:—

- 1st. Let the Inland Revenue Office at the capital town of each of the Provinces of the Dominion be charged with the collection of the royalty.
- 2nd. Let any printer intending to reprint a copyright book print off the title-pages first—not less than 500 at once—and forward them to the Inland Revenue officer of his province. Let him state the name of the author and publisher of the book to be reprinted, and the price he intends to publish at.
- 3rd. Let the printer send with the title-pages a cheque for ten per cent. upon the retail price of the number of books for which he has printed title-pages.
- 4th. The department will then stamp, *with an impressed stamp*, on the number of title-pages required for the proposed issue, a certificate of the payment of the royalty, and will remit the money to the Board of Trade in London for the owner's account.

If such a plan as this were adopted, every book would tell its own story. By a simple inspection of any single copy it would appear that the duty was duly paid; for no one would dare to counterfeit a Government stamp. The stamp, being impressed, could not be used for the book of another author, and the amount would at once be seen to correspond, or not, with the price asked for the book. Suitable penalties would, of course, afford a ready remedy to anyone aggrieved. The rate of ten per cent. is suggested because it is the customary rate in America.

Under this system any Canadian printer might reprint any book which might appear to promise a profit. In any event, the author's royalty would be secure. The process being of the nature of an expropriation, no one would have cause to claim a monopoly, and there might be many editions of the same book. The department would not stamp less than 500 title-pages at a time, because of the difficulty of accounting to the authors for small sums.

The terms of the Canadian Copyright Act would still enable any author to prevent a royalty edition, by printing his book in Canada, or authorising a reprint. He could also reprint his book in Canada at any time after publication. It frequently happens now that authors will do neither, but sell their advance-sheets to United States publishers, and sell the Canadian market to them also, by undertaking to prosecute under the Imperial Act of 1842 any Canadian who reprints the book in question. This has repeatedly occurred, and the Canadian printers object to their market being sold to a foreign country. On the other hand, many authors consider that they have a right to deal absolutely as they please with their own property. They do not admit that literary property is the creation of the Municipal Law of each nation, and must submit to the limitations imposed by each legislature; but they claim the power practically to suppress their book, if they wish, in any country. Views so fundamentally diverse can never be reconciled, and the plan proposed is necessarily a compromise. Even in the Act of 1842, it is provided that when the owner of a copyright (after the death of the author) will not keep his book in print, a licence may be issued by Government to anyone desirous of reprinting it.

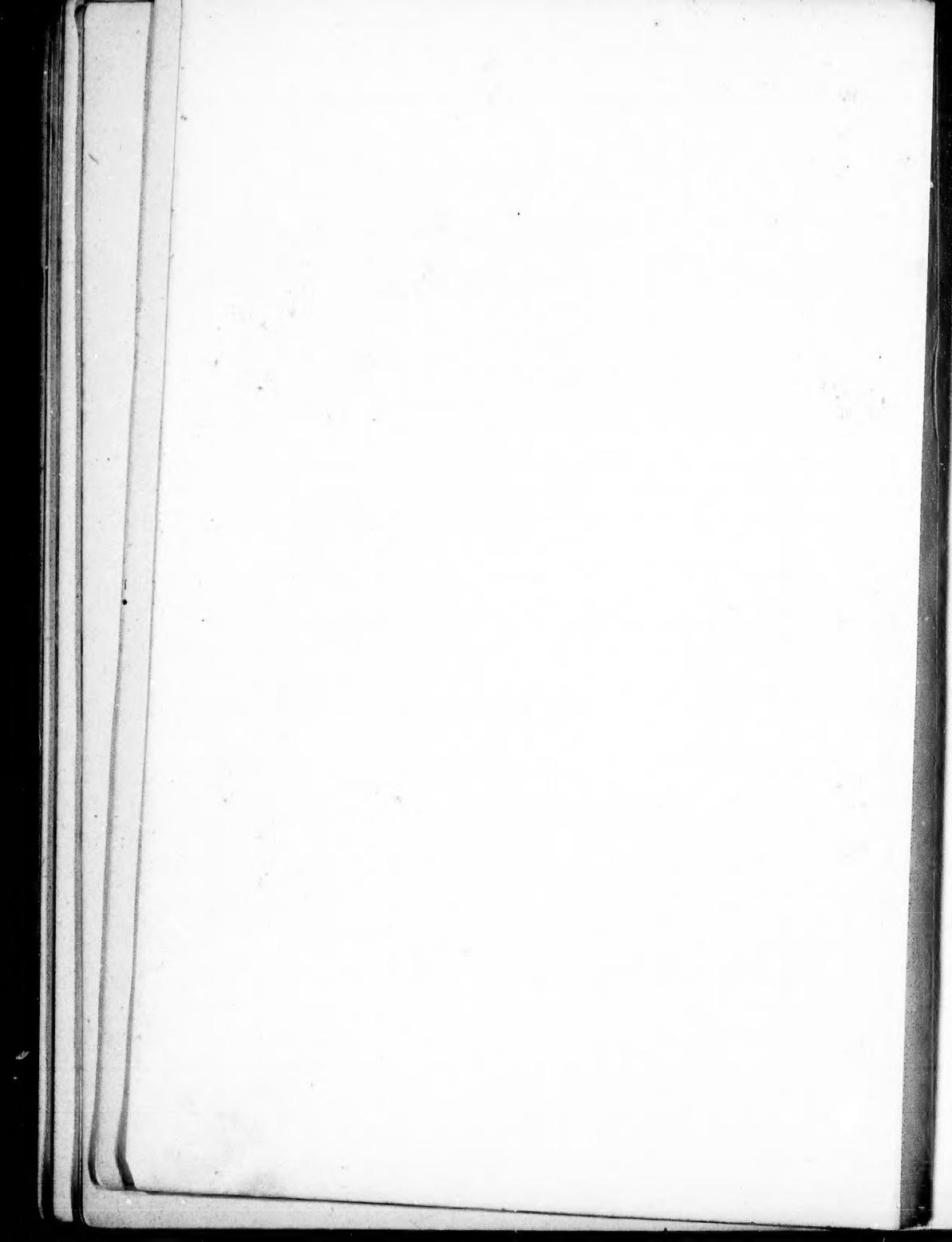
The interests of printers and publishers are not, however, the only interests to be considered in this question. It is very important that, under all circumstances, the original author's editions should not be excluded. Because, in the formation of libraries, the authentic editions must be had, and it would also be unreasonable to prevent a book collector from paying the author's price for his best edition, with a view of protecting an inferior local edition of the same work.

It would result from the adoption of such a plan that the works of United States authors would be reprinted in Canada very largely, and that Canadian reprints would pass southwards across the border with the same facility with which United States reprints now come into Canada. The literature of America is becoming every year increasingly valuable, and, as the population of that continent is increasing rapidly, the money value of copyrights must also increase at an accelerating rate. These considerations will no doubt in time result in an International Treaty based upon rational principles of a permanent and enduring nature. In the meantime some such plan as that above stated might be of benefit in reconciling the divergent views of author and printer. It seemed to the writer appropriate to add, as an appendix to his lecture, his own views as to a remedy for the present confusion.

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